

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BERNARDO MARTINEZ**

Claimant

VS.

**EXCEL CORPORATION**

Respondent,  
Self-Insured

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Docket No. 259,861

**ORDER**

Both claimant and respondent appealed the July 29, 2002 Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on February 4, 2003.

**APPEARANCES**

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Decision.

**ISSUES**

This is a claim for micro-trauma injuries to both hands, both arms, both shoulders, both feet, both legs, the back, right hip, neck and head. The parties stipulated the appropriate date of accident for this repetitive trauma claim was September 22, 2000.

In the July 29, 2002 Decision, Judge Fuller found claimant had sustained a 25.5 percent whole person functional impairment due to his work-related injuries. In determining claimant's ultimate functional impairment, the Judge averaged two ratings. One of those functional impairment ratings, however, did not rate claimant's actual present condition as it rated claimant as if he had undergone bilateral carpal tunnel release surgeries and had achieved a relatively successful result.

Claimant contends Judge Fuller erred. Claimant argues the Judge should not have used the functional impairment rating that was based upon assuming what claimant's impairment would be had he undergone bilateral carpal tunnel release surgeries. Claimant contends that rating is based upon speculation and conjecture. Accordingly, in his brief to the Board claimant requested the Board to find that claimant has sustained a 45 percent whole person functional impairment, which was the impairment rating provided by the treating physician, Dr. J. Raymundo Villanueva.

Conversely, respondent argues claimant's whole person functional impairment has been artificially inflated by his decision to forego bilateral carpal tunnel surgeries. Accordingly, respondent requests the Board to find that claimant has sustained a seven percent whole person functional impairment, which assumes claimant would have no permanent impairment in his upper extremities if he would undergo bilateral carpal tunnel surgeries and Guyon's canal surgeries.

The only issue before the Board on this appeal is the amount of claimant's whole person functional impairment for purposes of determining claimant's permanent partial general disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the arguments of the parties, the Board finds and concludes that claimant's permanent partial general disability should be increased to 39.5 percent.

The evidence is overwhelming claimant has sustained permanent injuries as a result of his work-related accident.

The company physician, Dr. J. Raymundo Villanueva, began treating claimant in October 2000 and in February 2001 recommended that claimant undergo surgery for bilateral carpal tunnel syndrome and bilateral Guyon's canal syndrome. In May 2001, after claimant had declined those surgeries, the doctor felt claimant was at a point of maximum medical improvement and rated claimant as having a 45 percent whole person functional impairment, which included ratings for bilateral shoulder injuries, bilateral carpal tunnel syndrome, bilateral Guyon's canal syndrome, and an injury to the right gluteal. The doctor's functional impairment rating appears to have been obtained from using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA Guides).

Dr. Villanueva also testified as to what claimant's functional impairment would be if he would undergo bilateral carpal tunnel release surgeries and bilateral Guyon's canal syndrome surgeries, assuming that he was entirely cured and assuming that he had mild residual symptoms following those multiple procedures. But the doctor acknowledged that

those opinions were based upon speculation and that he really had no idea as to the outcome of the proposed surgeries. The doctor testified, in part:

Q. (Mr. Ausemus) Now, the opinion that you have rendered here is that if he had a successful outcome to the surgery for the median and ulnar neuropathy, and of course, that's speculation at this point, that he would have had a successful outcome?

A. (Dr. Villanueva) Yes.<sup>1</sup>

. . . .

Q. Doctor, as a practical matter, at this point, you have no idea as to the outcome of the surgery, isn't that correct?

A. That is correct.<sup>2</sup>

On the other hand, Dr. Pedro A. Murati, who was hired by claimant's attorney to evaluate claimant's functional impairment, saw claimant in July 2001 and ultimately determined claimant sustained a 34 percent whole person functional impairment according to the *AMA Guides*. Dr. Murati rated claimant for bilateral carpal tunnel syndrome, bilateral Guyon's canal syndrome, myofascial pain syndrome in the neck, bilateral shoulder injuries, tenosynovitis in the right second digit, and a back injury.

Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

**Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto.** The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. **Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological**

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<sup>1</sup> Villanueva Depo. at 15-16.

<sup>2</sup> *Id.* at 22.

**capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.**

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

The above-quoted statute requires the AMA *Guides* to be used in determining a worker's functional impairment. The *Guides* specifically provide that a patient may decline surgery but that denial should neither increase nor decrease the estimated percentage of the patient's impairment. In his November 26, 2001 letter to claimant's attorney, Dr. Murati, quoting the AMA *Guides*, wrote, in part:

"A patient may decline treatment of an impairment with a surgical procedure, a pharmacologic agent, or other therapeutic approach. The view of the *Guides* contributors is that if a patient declines therapy for a permanent impairment, that decision should neither decrease nor increase the estimated percentage of the patient's impairment. However, the physician may wish to make a written comment ion [sic] the medical evaluation report about the suitability of the therapeutic approach and describe the basis of the patient's refusal."<sup>3</sup>

The Board concludes that claimant's present functional impairment rating should be based upon his actual present physical condition rather than based upon speculation of what it might be in the event he underwent multiple surgeries and achieved successful results. The Board concludes that claimant's functional impairment rating lies somewhere between Dr. Villanueva's 45 percent rating and Dr. Murati's 34 percent rating. Accordingly, the Board averages those ratings and determines claimant has sustained a 39.5 percent whole person functional impairment due to his work-related injuries.

Respondent's contention that claimant's functional impairment should be determined assuming he had undergone the recommended surgeries and successfully recovered from those surgeries is not supported by the language contained in the Workers Compensation Act. But there is an administrative regulation which provides that an unreasonable refusal to submit to medical or surgical treatment may result in the denial or termination of workers compensation benefits. That regulation provides:

An unreasonable refusal of the employee to submit to medical or surgical treatment, when the danger to life would be small and the probabilities of a permanent cure great, may result in denial or termination of compensation beyond the period of time

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<sup>3</sup> Murati Depo., Ex. 2.

that the injured worker would have been disabled had the worker submitted to medical or surgical treatment, but only after a hearing as to the reasonableness of such refusal.<sup>4</sup>

Nonetheless, the Board concludes that claimant did not unreasonably refuse surgical treatment.

Although the doctors generally agreed that the risks associated with the bilateral carpal tunnel releases and the bilateral Guyon's canal surgeries were small, the medical evidence also indicates that such surgeries have attendant risks. Such risks include a reaction to the anesthetic and drugs that are administered, damaging nerves, unintentionally cutting blood vessels and infection.

Board-certified orthopedic surgeon Dr. C. Reiff Brown testified, in part:

Q. (Mr. Ausemus) What are the risks that are involved in this type of surgical procedure?

A. (Dr. Brown) Any time you give anesthetic there's a risk of some sort of reaction to the drugs that are administered. With the general anesthetic the risk is somewhat greater than with locals or blocks that are commonly used, but there is a danger to life and limb from anesthetic complications or medications used.

There's also things that can happen during the surgical procedure. You can damage the nerves, the median nerve at the wrist or the ulnar nerve at the elbow or some of the smaller branches of nerves that involve -- that innervate muscles at the base of the thumb are fairly easy to traumatize in carpal tunnel surgery. It's also possible to cut blood vessels and there is the all present possibility that your surgery is not going to bring about the relief of the symptoms that is expected.

Q. All right. Do you also have a possibility of infection in this type of procedure?

A. Yes. Anytime you make an incision, there is that possibility.<sup>5</sup>

Dr. Brown also testified that it was reasonable for claimant to decline the multiple surgeries that had been recommended.

I think it's completely reasonable. If the decision to be made is up to the patient, a lot of things are involved; severity of symptoms, the person's feeling about operative

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<sup>4</sup> K.A.R. 51-9-5.

<sup>5</sup> Brown Depo. at 5-6.

procedures in general. Some people are fearful; some people are not. But the patient in general has to make the decision based on the possibilities that we've talked about here today, possibility of failure or recurrence and weigh with that how much trouble he feels he's actually having with these symptoms.

. . . .

I always advise people that they should not have surgery done until they feel like their lifestyle is being interfered with sufficiently to make those risks worth while *[sic]*.<sup>6</sup>

Claimant testified that he did not want to undergo the proposed surgeries to his wrists as he knew others who had undergone similar procedures who were worse following surgery. Another reason claimant was reluctant to undergo surgery was due to the fact that Dr. Villanueva had administered one or more injections that were supposed to relieve his symptoms but they were unsuccessful. As a result, claimant questioned whether the recommended surgeries would provide him any benefit. Finally, at the April 2002 hearing claimant testified that he was working for respondent in an accommodated job despite his injuries. Accordingly, the bilateral upper extremity injuries did not comprise an immediate threat to claimant's livelihood.

There is also a question whether the proposed surgeries would result in a permanent cure. The doctors recognize that there is no way to predetermine the outcome of the surgeries and that there is a risk that claimant would receive no benefit from the operations or that his condition would be worse.

When considering all the facts, the Board concludes that it was reasonable for claimant to decline the surgeries that were recommended by Dr. Villanueva. Consequently, claimant's workers compensation benefits should not be denied or terminated under the above-quoted administrative regulation.

Claimant acknowledges that his permanent partial general disability is limited to his whole person functional impairment rating. As indicated above, claimant has a 39.5 percent whole person functional impairment due to his work-related injuries. Consequently, claimant's permanent partial general disability is also 39.5 percent.

### **AWARD**

**WHEREFORE**, the Board modifies the July 29, 2002 Decision entered by Judge Fuller and increases the permanent partial general disability from 25.5 percent to 39.5 percent.

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<sup>6</sup> *Id.* at 7-8.

Bernardo Martinez is granted compensation from Excel Corporation for a September 22, 2000 accident and resulting disability. Based upon an average weekly wage of \$474.72, Mr. Martinez is entitled to receive 157.98 weeks of permanent partial general disability benefits at \$316.50 per week in the sum not to exceed \$50,000 for a 39.5 percent permanent partial general disability and a total award not to exceed \$50,000, which is the maximum allowed for a functional impairment award under the Workers Compensation Act.<sup>7</sup>

As of February 10, 2003, there is due and owing to Mr. Martinez 124.43 weeks of permanent partial general disability compensation at \$316.50 per week in the sum of \$39,382.10, for a total due and owing of \$39,382.10, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$10,617.90 shall be paid at \$316.50 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Decision that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant  
D. Shane Bangerter, Attorney for Respondent  
Pamela J. Fuller, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>7</sup> See K.S.A. 44-510f(a)(4).